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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,	)	3:06-cr-00073-HDM
	)	3:16-cv-00073-HDM
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
WILLIAM EDWARD ARMSTRONG,	)	
	)	
Defendant.	)	
_____	)	

On February 16, 2016, defendant filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 32). On March 14, 2016, the government filed a response (ECF No. 36), and on March 21, 2016, the defendant filed a reply (ECF No. 37). On March 23, 2016, and June 3, 2016, the court stayed proceedings pending decisions by the Supreme Court and Ninth Circuit Court of Appeals (ECF Nos. 38 & 39). On August 3, 2016, the court lifted the stay (ECF No. 40).

1 On September 9, 2016, defendant filed an "Emergency Motion for  
2 Status Conference" (ECF No. 41). At a status conference on  
3 September 28, 2016, the court indicated that it was inclined to  
4 further stay proceedings pending the Supreme Court's decision in  
5 *Beckles v. United States*, No. 15-8544. The court indicated that a  
6 stay would not be prejudicial because even on the merits defendant  
7 likely was not entitled to § 2255 relief. Defendant opposed the  
8 stay and asked the court to proceed to decide his case on the  
9 merits. (See ECF No. 44).

10 On March 6, 2017, the court ordered the defendant to show  
11 cause why *Beckles* did not require the court to deny his motion. On  
12 April 20, 2017, defendant filed a motion for voluntary dismissal of  
13 his § 2255 motion pursuant to Federal Rule of Civil Procedure  
14 41(a)(2) (ECF No. 48). The court initially granted the motion on  
15 April 21, 2017, but vacated its order after the government filed a  
16 motion to reconsider (ECF No. 50). Defendant has responded to the  
17 motion to reconsider (ECF No. 53), and the government has replied  
18 (ECF No. 55).

19 While the parties disagree on the applicability of Rule 41(a)  
20 to § 2255 proceedings, the court need not decide the issue. Even  
21 assuming Rule 41(a)(2) can be applied, it is within the court's  
22 discretion whether to grant a dismissal under that rule. See Fed.  
23 R. Civ. P. 41(a)(2) ("[A]n action may be dismissed at the  
24 plaintiff's request only by court order, on terms that the court  
25 considers proper."); *Stevedoring Servs. of Am. v. Armilla Int'l*  
26 *B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) ("[A] motion for voluntary  
27 dismissal under Rule 41(a)(2) is addressed to the district court's  
28 sound discretion . . . ."). "The purpose of the rule is to permit

1 a plaintiff to dismiss an action without prejudice so long as the  
2 defendant will not be prejudiced, or unfairly affected by  
3 dismissal.” *Id.* (internal citations omitted). The court concludes  
4 that, under the circumstances of this case, the government would be  
5 unfairly affected by a dismissal of defendant’s petition without  
6 prejudice. Not only was the government required to respond to  
7 defendant’s motion, but defendant sought a resolution of his motion  
8 well before the Supreme Court’s decision in *Beckles* – even after  
9 the court had indicated it would likely be denied. If the court  
10 had proceeded as defendant then wished, and the motion had been  
11 denied, defendant would not have been able to file any second or  
12 successive motion – and the government would not be required to  
13 respond to any such motion – unless defendant first received  
14 authorization from the Court of Appeals. If the court allows  
15 voluntary dismissal at this juncture, however, the government may  
16 have to relitigate whether any future motions filed by defendant  
17 are subject to the second or successive limitation of 28 U.S.C. §  
18 2255(h). The court therefore concludes it should decide  
19 defendant’s motion on its merits now and therefore **DENIES** the  
20 motion for voluntary dismissal. The government’s motion to  
21 reconsider is accordingly **GRANTED**.

22 In his § 2255 motion, defendant seeks relief based on *Johnson*  
23 *v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme  
24 Court held that the residual clause in the ACCA’s definition of  
25 “violent felony” is unconstitutionally vague. Defendant was not  
26 charged or sentenced under the ACCA. Rather, he was found to be a  
27 career offender under U.S.S.G. § 4B1.1. Under § 4B1.1, a defendant  
28 qualifies as a career offender if:

1 (1) the defendant was at least eighteen years old at the  
2 time the defendant committed the instant offense of  
3 conviction; (2) the instant offense of conviction is a  
4 felony that is either a crime of violence or a controlled  
5 substance offense; and (3) the defendant has at least two  
6 prior felony convictions of either a crime of violence or  
7 a controlled substance offense.

8 At sentencing, the court determined that defendant qualified as a  
9 career offender because he had two prior crimes of violence and his  
10 instant offense was a crime of violence. All three crimes were the  
11 same: bank robbery in violation of 18 U.S.C. § 2113(a). The  
12 definition of "crime of violence" for purposes of the career  
13 offender guideline includes a residual clause that is identical to  
14 that in the ACCA. See U.S.S.G. § 4B1.2(a). Defendant argued that  
15 *Johnson* invalidated this residual clause, that bank robbery in  
16 violation of § 2113(a) qualified as a "crime of violence" only  
17 under the residual clause, and that he is therefore entitled to  
18 relief.

19 On March 6, 2017, the United States Supreme Court determined  
20 that *Johnson* does not apply to the Guidelines. *Beckles v. United*  
21 *States*, 580 U.S. — , 137 S. Ct. 886 (Mar. 6, 2017). As defendant's  
22 claim for relief depends on *Johnson* applying to the Guidelines and  
23 the Supreme Court has held *Johnson* does not apply to the  
24 Guidelines, defendant is not entitled to any relief. Defendant's §  
25 2255 motion (ECF No. 32) therefore must be and hereby is **DENIED**.

26 The standard for issuance of a certificate of appealability  
27 calls for a "substantial showing of the denial of a constitutional  
28 right." 28 U.S.C. § 2253(c). The Supreme Court has interpreted 28

1 U.S.C. § 2253(c) as follows:

2       Where a district court has rejected the  
3       constitutional claims on the merits, the  
4       showing required to satisfy §2253(c) is  
5       straightforward: The petitioner must  
6       demonstrate that reasonable jurists would find  
7       the district court's assessment of the  
8       constitutional claims debatable or wrong. The  
9       issue becomes somewhat more complicated where,  
10      as here, the district court dismisses the  
11      petition based on procedural grounds. We hold  
12      as follows: When the district court denies a  
13      habeas petition on procedural grounds without  
14      reaching the prisoner's underlying  
15      constitutional claim, a COA should issue when  
16      the prisoner shows, at least, that jurists of  
17      reason would find it debatable whether the  
18      petition states a valid claim of the denial of  
19      a constitutional right and that jurists of  
20      reason would find it debatable whether the  
21      district court was correct in its procedural  
22      ruling.

23      *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v.*  
24      *Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court  
25      further illuminated the standard for issuance of a certificate of  
26      appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The  
27      Court stated in that case:

28       We do not require petitioner to prove, before  
29       the issuance of a COA, that some jurists would  
30       grant the petition for habeas corpus. Indeed,  
31       a claim can be debatable even though every  
32       jurist of reason might agree, after the COA has  
33       been granted and the case has received full  
34       consideration, that petitioner will not  
35       prevail. As we stated in *Slack*, "[w]here a  
36       district court has rejected the constitutional  
37       claims on the merits, the showing required to  
38       satisfy § 2253(c) is straightforward: The  
39       petitioner must demonstrate that reasonable  
40       jurists would find the district court's  
41       assessment of the constitutional claims  
42       debatable or wrong."

43      *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

44       The court has considered the issues raised by defendant with  
45      respect to whether they satisfy the standard for issuance of a

1 certificate of appeal and determines that none meet that standard.  
2 The court will therefore deny defendant a certificate of  
3 appealability.

4 In accordance with the foregoing, the government's motion to  
5 reconsider (ECF No. 50) is **GRANTED**. The defendant's motion for  
6 voluntary dismissal (ECF No. 48) and his motion pursuant to § 2255  
7 (ECF No. 32) are **DENIED**. The court further denies defendant a  
8 certificate of appealability.

9 **IT IS SO ORDERED.**

10 DATED: This 26th day of June, 2017.

11   
12 UNITED STATES DISTRICT JUDGE

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